BADAN PENCEGAH RASUAH A

v.

CHONG CHEE LIONG

HIGH COURT SABAH & SARAWAK, KUCHING B
RAVINTHRAN PARAMAGURU JC
[CRIMINAL APPEAL NO: 42A-3-2010-III]
14 JUNE 2010

CRIMINAL PROCEDURE: *Revision - Revisionary powers of High* C
Court - Appeal - Notes of proceedings and grounds of judgment of lower court unavailable - Whether High Court can still exercise its revisionary powers - Whether a grave injustice to order a retrial - Factors to be considered - Criminal Procedure Code, s. 316

CRIMINAL PROCEDURE: *Criminal revision - Revisionary* D
jurisdiction of High Court - Appeal - Notes of proceedings and grounds of judgment of lower court unavailable - Whether High Court can still exercise its revisionary powers - Whether a grave injustice to order a retrial - Factors to be considered - Criminal Procedure Code, s. 316 E

CRIMINAL PROCEDURE: *Appeal - Appeal to High Court - Notes of proceedings and grounds of judgment of lower court unavailable - Whether High Court can still exercise its revisionary powers - Whether a grave injustice to order a retrial - Factors to be considered - Criminal Procedure Code, s. 316* F

CRIMINAL PROCEDURE: *Jurisdiction of court - High Court -*
Appeal - Notes of proceedings and grounds of judgment of lower court unavailable - Whether High Court can still exercise its revisionary powers - Whether a grave injustice to order a retrial - Factors to be considered - Criminal Procedure Code, s. 316 G

The respondent/accused was charged with four counts of an offence – allegedly committed between 20 November 1995 and 21 December 1995 – under s. 4(c) of the Prevention of Corruption Act 1961. The H
sessions court judge conducted the trial in 2000, acquitting and discharging the accused at the end of the case for the defence. The appellant/Public Prosecutor immediately appealed against the decision but the appeal only came to the attention of the High Court on 21 April 2010, when it was immediately set for hearing. I
The Record of Appeal, however, could not be compiled as there

were no notes of proceedings or grounds of decision written by the trial judge. It was submitted by the DPP that in view of the absence of the grounds of judgment and notes of proceedings, the court could convert the appeal to a revision and make any order permitted under s. 316 of the Criminal Procedure Code ('CPC'). The accused, however, contended that since the record of the lower court was not available, the court could not act in revision and the only course open to it was to dismiss the appeal.

Held (dismissing the appeal, and affirming the decision of the sessions court judge):

(1) The High Court can exercise its revisionary powers when hearing an appeal where the grounds of judgment are not forthcoming and pursuant to the established case authorities, especially the case of *Hari Ram Seghal v. Public Prosecutor*, it can exercise those powers even if the record of proceedings of the lower court is not available. *Jaafar Abu & Anor v. PP* (foll); *Hari Ram Seghal v. Public Prosecutor* (foll). (paras 8 & 9)

(2) In the instant case, the accused had been acquitted by the lower court and, more importantly and decisively, 15 long years had elapsed since the alleged commission of the offence. In the premises, a grave injustice would be occasioned if the ordeal of a fresh trial were to be visited upon the accused after all those years. In the exercise of this court's revisionary jurisdiction, it had the power to dismiss the appeal under s. 316 of the CPC. For the aforementioned reasons, a retrial would not be ordered. *Pekan Ripul v. PP* (foll); *Hari Ram Seghal v. Public Prosecutor* (foll). (paras 13 & 14)

Case(s) referred to:

Azman Jamhuri v. PP [2001] 1 CLJ 539 HC ***(refd)***
Hari Ram Seghal v. PP [1980] 1 LNS 116 ***(foll)***
Jaafar Abu & Anor v. PP [1988] 2 CLJ 595; [1988] 1 CLJ (Rep) 142 SC ***(foll)***
Kassim Utus v. PP [2005] 7 CLJ 273 HC ***(refd)***
Mohamad Syaifuddin Ahmad Yassin v. PP [2007] 9 CLJ 120 HC ***(refd)***
Mohamad Zubir Mustafa v. PP [2009] 10 CLJ 281 HC ***(refd)***
Pekan Ripul v. PP [2009] 1 LNS 789 HC ***(foll)***
TN Nathan v. PP [1977] 1 LNS 127 HC ***(refd)***
Voon Chin Fatt v. PP [1948] 1 LNS 149 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 307, 308, 316(a), 323, 325
Prevention of Corruption Act 1961, s. 4(c)

For the appellant - Wirna Hj Ariffin DPP
For the respondent - Anthony Tai; M/s Anthony Tai Advocates

Reported by Suresh Nathan

JUDGMENT

Ravinthran Paramaguru JC:

Introduction

[1] This is a rare case where the entire lower court file including the notes of proceedings pertaining to a criminal appeal has gone completely missing. The notice of appeal was never withdrawn and therefore the appeal was left in a permanent state of abeyance. I shall briefly outline the facts leading to the present proceedings as follows.

[2] The appellant in this case is the Public Prosecutor. The respondent is a Sarawak Forestry Department officer. For sake of convenience, I shall refer to the respondent as the accused. The accused was charged with four counts of an offence under s. 4(c) of the Prevention of Corruption Act 1961. The offences were allegedly committed between 20 November 1995 and 21 December 1995. The Sessions Court Judge conducted the trial in 2000 and gave decision in the same year. He acquitted and discharged the accused at the end of the case for the defence. The prosecution immediately appealed against the decision. However, the appeal was never registered in the High Court registry. The appeal came to the attention of the High Court only on 21 April 2010, when the Public Service Commission of Sarawak wrote to the court to enquire about the matter. Subsequently the appeal of the prosecution was registered on the same day. The appeal was then set for hearing before me without delay although the record of appeal could not be compiled.

Hearing In The High Court

[3] At the outset of the hearing, I told the parties that the case file which contained the notes of proceedings was presumably taken by the trial judge about ten years ago and the lower court registrar

never managed to retrieve it. I was given to understand that action had been taken against this particular trial judge in respect of a host of other similar cases where he had neglected to write the grounds of judgment. In this case as well, the trial judge never wrote the grounds of decision. There were two other corruption cases against the same accused which were heard by a different Sessions Court Judge. The accused was acquitted of the charges in those cases. The Sessions Court decision was affirmed by the High Court and Court of Appeal. During the first hearing before me, learned counsel for accused urged the prosecution to withdraw the appeal. However, when the court resumed hearing on the next date, the learned DPP indicated that she wished to proceed with the appeal notwithstanding the absence of the notes of proceedings and grounds of appeal.

Revision

[4] The learned DPP submitted that in view of the absence of the grounds of appeal and the notes of proceedings, the court can convert the appeal to a revision and make any order permitted under s. 316 of the Criminal Procedure Code. On the other hand, learned counsel for accused, submitted that since the record of the lower court is not available, the court cannot act in revision and therefore the only course open to me is to dismiss the appeal. I shall now consider the provisions of the Criminal Procedure Code which deal with the power of the High Court to exercise revisionary jurisdiction over the lower court. Section 323 of Criminal Procedure Code provides as follows:

> **323. Powers to call for records of subordinate Courts**
>
> (1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.
>
> (2) Orders made under sections 97 and 98 are not proceedings within the meaning of this section.

[5] Learned counsel for accused may be right in submitting that there is no record for me to examine as there are no notes of proceedings or grounds of decision. He argued that therefore it follows that I cannot exercise my powers of revision. With respect, if this argument of learned counsel for accused is accepted as valid,

the appeal in question can never ever be disposed off. This is because an appeal proper can only be heard if a record of appeal is prepared in accordance with s. 307 and transmitted to the High Court under s. 308 of the Criminal Procedure Code. Counsel for accused is therefore wrong to submit that I can dismiss this appeal without exercising my powers of revision. In this case, the notes of proceedings and grounds of decision, through no fault of the parties, were never delivered and would never be forthcoming for the preparation of the record of appeal. If counsel for accused is right in his argument that I can only act in revision if the notes of proceeding are available, the outlook for the future is rather grim for his client. It would mean that the accused, although acquitted of the charges in question, would never live to see the day when the Sarawak Public Service Department would be able to lift the interdiction order made against him and process his pension papers which would be due soon. Very fortunately for justice, there are eminent authorities that say that the High Court is not restricted by s. 323 of the Criminal Procedure Code in requiring the notes of proceedings and grounds of decision before exercising its revisionary jurisdiction.

[6] A long line of local cases beginning with the Supreme Court case of *Jaafar Abu & Anor v. PP* [1988] 2 CLJ 595; [1988] 1 CLJ (Rep) 142 have held that the High Court, apart from having the power to call the records of the lower court under s. 323 to satisfy itself of the correctness, legality or propriety of its decision, also retain the power to act in revision when hearing an appeal. In *Jaafar Abu & Anor v. PP (supra)*, the following question was posed to the Supreme Court:

(1) When there is an appeal pending and no grounds of judgment are available can the High Court act in revision?

(2) If the answer is yes, what is the proper order the learned judge should make.

[7] In the above case, the magistrate had left the Judicial Service without writing the grounds of judgment. Lee Hun Hoe CJ had no doubt that the High Court in hearing an appeal can proceed to exercise its revisionary powers. Therefore, it must be noted that without the grounds of judgment, the record of appeal would have been incomplete for non-compliance with s. 307 but nonetheless the Supreme Court held the court could proceed to exercise its

revisionary jurisdiction. This authority is often cited in appeal cases when the written judgment was never delivered and the High Court is minded to exercise its revisionary jurisdiction to prevent an appeal from remaining in perpetual abeyance (see *Azman Jamhuri v. PP* [2001] 1 CLJ 539, *Kassim Utus v. PP* [2005] 7 CLJ 273, *Mohamad Syaifuddin Ahmad Yassin v. PP* [2007] 9 CLJ 120 and *Mohamad Zubir Mustafa v. PP* [2009] 10 CLJ 281). Coincidentally, the trial judge in *Azman Jamhuri v. PP (supra)* and *Mohamad Syaifuddin Ahmad Yassin v. PP (supra)* is the very same trial judge as in the instant case.

[8] The above cases are authority for the proposition that the High Court can exercise its revisionary powers when hearing an appeal where the grounds of judgment is not forthcoming. Counsel for accused correctly pointed out to me that this case is different from the above cited cases in that even the notes of proceedings are not available. After a second adjournment, both counsel for accused and the learned DPP assured me that the instant case is without precedent in our law reports as both the grounds and notes of proceedings are not available. However, in the writing of this judgment, I have derived great assistance from the judgment of Wan Yahya J in *Hari Ram Seghal v Public Prosecutor* [1980] 1 LNS 116. Therefore, contrary to the assurance of learned counsel for accused and learned DPP that there is no case in point, *Hari Ram Seghal v. Public Prosecutor (supra)* which was not cited to me appears to be on all fours with the instant case insofar as the missing notes of proceedings is concerned. In *Hari Ram Seghal v. Public Prosecutor (supra)*, the entire file, including the notes of proceedings went missing when the trial magistrate left the Judicial Service for further studies. Wan Yahya J made certain observations in respect of the revisionary jurisdiction of the High Court which are highly pertinent to the issue at hand. The relevant excerpts from the judgment of Wan Yahya J bear repetition here:

> The power of revision has been exercised from time to time by the High Court in order to correct any imbalance of justice arising from judgments and orders of the subordinate courts, but no High Court has so far been exhorted to exercise its revisionary powers to redress injustice originating from a Magistrate's incompetence, irresponsibility and indolence.

My first impression on reading the above section was that the section merely empowered a judge to exercise his revisionary powers after he had examined the records of any criminal proceedings before an inferior court; *that it did not give him the power to revise the decision of a lower court where the proceedings was not available …*

That, to my mind, is not what the lawmakers exactly intended it to mean. The powers of revision by a High Court, as contained in Pt VII of the Criminal Procedure Code and s. 31 of the Courts of Judicature Act must be given a wider interpretation.

Although both make specific mention for calling for records of proceedings, they should not be read as restricting or derogating from the obvious intention of the legislature to clothe the High Court with its parental or supervisory jurisdiction. The object of these provisions is to correct any miscarriage of justice arising not only from error in judgment and procedure *but from neglect or indolence on the part of those in authority and resulting in undeserved hardship on any individual affected by such judgment, neglect or indolence.*

Reference to the calling and examining of records of proceedings, to my mind, is to be interpreted as power enabling the High Court to require the production of the records before it and not as a mandatory direction.

If that phrase is to be given a stricter interpretation, no court can exercise its revisionary powers to correct any miscarriage of justice where the records of proceedings have become unavailable.

(emphasis added)

[9] From reading all the above cases, especially *Hari Ram Seghal v. Public Prosecutor (supra)*, I am of the view that the High Court can exercise its revisionary powers even if the record of proceedings of the lower court are not available.

Decision On Revision

[10] The learned DPP submitted that in exercising my revisionary powers I can make any of the following orders under s. 316(a) (read together with s. 325) of the Criminal Procedure Code:

(a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;

[11] During argument, I had occasion to point out to her that under s. 325, the court cannot substitute an order of acquittal with one of conviction. She urged me to set aside the acquittal and order a re-trial as the prosecution has been prejudiced by the non-delivery of the notes of proceedings and grounds of judgment. It is easy to understand the disappointment of the prosecution. They were dissatisfied with the decision of the Sessions Court Judge to acquit the accused but their appeal had been frustrated by circumstances beyond their control. However, that is not a ground for me to order a re-trial. The power to order a retrial under s. 316 is a discretionary power. As stated by David Wong Dak Wah J in *Pekan Ripul v. PP* [2009] 1 LNS 789, the courts usually take into account two factors in exercising this power:

> 1. Whether the interval between the commission of the alleged offence and the retrial would prejudice the Appellant's preparation of his defence?
>
> 2. Whether a retrial amounts to giving the prosecution a second bite of the apple?

[12] Giving the prosecution a second bite at the apple obviously does not arise in this case. The important consideration here is whether the accused would be prejudiced in his defence if a re-trial is ordered. There are a number of reported cases where upon quashing the conviction of the trial court on the ground of misdirection or delay in supplying the grounds of decision or other reasons, the appellate court refused to order a re-trial because of the long passage of time (see *Voon Chin Fatt v. Public Prosecutor* [1948] 1 LNS 149, *TN Nathan v. Public Prosecutor* [1977] 1 LNS 127, *Hari Ram Seghal v. Public Prosecutor (supra) and Azman Jamhuri v. PP (supra)*). For example, in *Hari Ram Seghal v. Public Prosecutor (supra)* Wan Yahya J made the following observation in refusing the request for retrial:

> Justice here does not mean justice to the accuser alone but also to the accused and justice will be better served in the present instance to free a person, who had been unjustifiably deprived of his right to appeal, from the jeopardy of a second trial ...
>
> The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in that machinery, which may have the possibility of injustice, must be resolved in their favour.

[13] In the instant case, the accused stands on better ground to object to a re-trial. In most of the above cases, the accused was convicted by the lower court. In this case, the accused was acquitted. However the more important and decisive factor here is that about fifteen long years have elapsed since the alleged commission of the offence compared to only about five years in the above mentioned case. In the premises, grave injustice would be occasioned if the ordeal of fresh trial is visited upon the accused after all these years. In the exercise of my revisionary jurisdiction, I have the power to dismiss the appeal under s. 316 of the Criminal Procedure Code.

[14] For the reasons given above, I shall not order a re-trial. I shall therefore dismiss the appeal and affirm the decision of the Session Court Judge to acquit the accused on all the charges.